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Bill of Rights and National Symbols: Flag Descration, People v. Radich, 257 N.E.2d 30 (1970)

THE BILL OF RIGHTS AND NATIONAL SYMBOLS: FLAG DESECRATION

People v. Radich, 26 N.Y.2d 114, 257 N.E.2d 30, 308 N.Y.S.2d 846 (1970), appeal docketed, No. 169, 39 U.S.L.W. 3013 (U.S. 5-18-70)

> I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.
>
> What was once an easy, automatic rite of patriotism has become in many cases a considered political act, burdened with overtones and conflicting meanings greater than Old Glory was ever meant to bear. . . .
>
> Some, mostly the defiant young, blow their noses on it, sleep in it, set it afire, or wear it to patch the seat of their trousers. In response, others wave it with defensive pride, crack skulls in its name, and fly it from their garbage trucks, police cars and skyscraper scaffolds.
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> Time, July 6, 1970, at 12.

Radich, an art gallery proprietor and art dealer, was arrested for publicly displaying in his gallery several "constructions" which included, as a part of their composition, American flags.[1] He was subsequently convicted for violation of the New York flag desecration statute, which provides: "Any person who shall . . . publicly mutilate, deface, trample upon, or cast contempt upon either by word or act . . . the flag of the United States of America . . . shall be deemed guilty of a misdemeanor."[2] Arguing that his "act" of displaying the art work was a protected expression of protest to the United States' involvement in Indochina,[3] defendant appealed. *Held*: Incidental suppression of expression under a flag desecration statute is a permissable infringement of first amendment activity if the statute is reasonably and primarily designed to insure the preservation of public order.[4] Thus, because the legislative purpose of the New York law is to prevent conduct which may provoke breaches of the peace, convictions for "acts" in violation of the statute, even if the act is intended to serve as a form of expression, are not unconstitutional under the first amendment.

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1. People v. Radich, 53 Misc.2d 717, 279 N.Y.S.2d 680 (N.Y. City Crim. Ct. 1967), *aff'd*, 26 N.Y.2d 114, 257 N.E.2d 30, 308 N.Y.S.2d 846 (1970), *appeal docketed*, no. 169, 39 U.S.L.W. 3013 (U.S. May 18, 1970). The constructions included: an erect penis wrapped in a flag, a flag in the form of a body hanging from a yellow noose, the flag attached to a two wheeled vehicle, the union of the flag depicted in the form of an octopus and others. *See also* Life, March 31, 1967, at 18

2. N.Y. PENAL LAW § 1425(16)(d) (1909) [now N.Y. GEN. BUS. LAW § 136 (McKinney)].

3. People v. Radich, 26 N.Y.2d 114, ___, 257 N.E.2d 30, 31, 308 N.Y.S.2d 846, 847 (1970).

4. *Id.* at ____, 257 N.E.2d at 36, 308 N.Y.S.2d at 854.

I. EARLY DEVELOPMENT AND BACKGROUND

Between 1895 and 1906, in response to lobbying efforts of the American Flag Association and widespread abuse of the flag for both commercial and political advertising campaigns—during the heated 1896 presidential campaign, flags were used by all parties, and repeatedly torn and trampled[5]—more than half the states enacted flag-protective legislation.[6] The Supreme Court, reversing a contrary trend in state courts,[7] held these statutes constitutional in *Halter v. Nebraska*.[8]

The Court in that decision, noting the patriotic motivation for Nebraska's prohibition of the use of the flag in advertising, concluded:

> From the earliest periods in the history of the human race, banners, standards, and ensigns have been adopted as symbols of the power and history of the peoples who bore them . . . . To every true American the flag is the symbol of the nation's power—the emblem of freedom in its truest, best sense. It is not extravagant to say that to all lovers of the country it signifies government resting on the consent of the governed; liberty regulated by law; the protection of the weak against the strong; security against the exercise of arbitrary power; and absolute safety for free institutions against foreign aggression. As the statute in question evidently had its origin in a purpose to cultivate a feeling of patriotism among the people of Nebraska, we are unwilling to adjudge that in legislation for that purpose the state erred in duty or has infringed the constitutional right of anyone. On the contrary, it may reasonably be affirmed to encourage its people to love the Union with which the state is indissolubly connected.
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> ***
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> No American, nor any foreign born person who enjoys the privileges of American citizenship, ever looks upon [the flag] without taking pride in the fact that he lives under this free government. Hence, *it has often occurred that insults to the flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot.*[9] (Emphasis added)

The blank check provided in *Halter* for patriotically motivated

5. UNIFORM FLAG ACT, Commissioner's Prefatory Note at 48 (1966).

6. *Id.* at 49. *See also* Halter v. Nebraska, 205 U.S. 34, 36 (1907); Note, *Flag Burning, Flag Waving and the Law*, 4 VALPO. L. REV. 345 (1970).

7. *E.g.*, Ruhstrat v. People, 185 Ill. 133, 57 N.E. 41 (1900); People *ex rel.* McPike v. Van de Carr, 91 App. Div. 20, 86 N.Y.S. 644, *aff'd*, 178 N.Y. 425 (1904).

8. 205 U.S. 34 (1907). Involved was Nebraska's prohibition of advertising use of the flag. The defendant used a flag on his beer bottle label.

9. *Id.* at 42-43.

legislation has been curtailed by subsequent decisions; of continuing significance, however, is that portion of *Halter* which takes judicial notice of "insults" to the flag as fighting words.

Patriotism and the promotion of loyalty to the flag lost their status as overriding justifications for official action in *West Virginia State Board of Education v. Barnette*.[10] That decision involved a state requirement of a flag salute in public school exercises. Several Jehovah's Witnesses refused to comply with the requirement of a salute on grounds of religious freedom. Reversing its widely disapproved position of three years previous in *Minerville School District v. Gobitis*,[11] the Court ruled that the first amendment limited the power of states to compel patriotism or loyalty:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.
>
> We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment of the Constitution to reserve from all official control.[12]

Symbolic conduct, as that term is now popularly used, describes conduct which utilizes "speech" and "non-speech" elements for the communication of an idea which, if spoken, would be protected under the first amendment.[13] Apart from the protected "speech", the state may have a legitimate interest in regulating the particular conduct employed.

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10. 319 U.S. 624 (1943). *See generally* D. MANWARING, RENDER UNTO CAESER: THE FLAG SALUTE CONTROVERSY (1962).

11. 310 U.S. 586 (1940).

12. 319 U.S. at 642. Although *Barnette* involved a refusal grounded in the religious training of Jehovah's Witnesses, the Court did not limit itself to a "freedom of worship" basis. Instead, the Court held that the salute requirement would violate first amendment limitations on state action, even if not violative of the freedom of worship itself. The Court stated:

> While religion supplies appellee's motive for enduring the discomforts of making an issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual. It is not necessary to inquire whether nonconformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty.

Id at 634-35.

13. *E.g.*, Tinker v. Des Moines Board of Education, 393 U.S. 503 (1969); United States v. O'Brien, 391 U.S. 367 (1968). *See generally* Alfange, Jr., *Free Speech and Symbolic Conduct: The Draft-Card Burning Case*, 1968 SUP. CT. REV. 1; Note, *Symbolic Conduct*, 68 COLUM. L. REV. 1091 (1968); 32 BROOK. L. REV. 334 (1966).

A tragic and altogether too frequent example of such a case is political assassination. The question, recently responded to by the Supreme Court in *O'Brien v. United States*,[14] is the extent to which the state may regulate the conduct where there is an incidental suppression of the protected expression. In *O'Brien*, a draft card burning case, the Court formulated four inter-related tests for the measurement of the constitutionality of official proscription of such symbolic conduct. They are: Whether the proscription is within the constitutional power of the government; whether it furthers an important and substantial governmental interest; whether that governmental interest is unrelated to the suppression of first amendment expression; and whether the "incidental restriction on alleged first amendment freedom is no greater than is essential to the furtherance of that interest."[15]

A refusal to pledge allegiance to the flag could, depending on the intent of the refusal, combine elements of speech and conduct sufficient to amount to symbolic conduct. The Court in *Barnette* did not, however, review the legislation in question in that case as a regulation of symbolic conduct. Instead, the Court found that the salute and pledge requirement was unconstitutional because it was designed to *compel affirmative acts* of patriotism. Because flag desecration statutes are designed to *prohibit* conduct directed toward the flag, rather than compel any affirmative act of loyalty, *Barnette's* importance for such flag legislation is its implicit proposition that a state cannot implement, under the guise of regulating conduct, a legislative intent to coerce political orthodoxy. Pragmatically, what this means is that the judiciary, before it can sustain the constitutionality of flag desecration statutes, must find as required in *O'Brien* that the statute was reasonably designed to further some governmental interest unrelated to the suppression of expression.

The statute under which Radich was convicted has been before the Court after *O'Brien* in *Street v. New York*.[16] Reacting to the wounding of James Meredith in a civil rights march, Street burned a flag on a crowded New York street corner accompanied by exclamations that: "We don't need no damn flag!" Although the issues before the Court were characterized in terms of flag burning as symbolic speech, a scant trial record and a general verdict enabled the Court to entirely avoid applying the *O'Brien* tests.[17] In the first instance the Court determined

14. 391 U.S. 367 (1968).
15. *Id.* at 377.
16. 394 U.S. 576 (1969).
17. *Id.* at 594.

that the conviction could have been unconstitutionally based on Street's words alone.[18] Second, the Court avoided application of *Halter's* "fighting words" dictum to Street's advocacy. To do so, Justice Harlan, grandson of the Justice who wrote *Halter*, characterized Street's words not as insults to the flag but ". . . only . . . somewhat excited public advocacy of the idea that the United States should abandon, at least temporarily, one of its national symbols."[19] Based on this characterization, Harlan was able to conclude: "It is clear that the Fourteenth Amendment prohibits the states from imposing criminal punishment for public advocacy of peaceful change in our institutions."[20]

Radich, in view of its ample trial and appeal court record, may force the Supreme Court to test flag desecration under *O'Brien*. However, *Street's* contorted avoidance, and the similar avoidance (by emphasis on equal protection over symbolic speech aspects of the case) in *Tinker v. Des Moines Independent School District*,[21] an armband case, seem to indicate a Court unwilling to do so.

II. Protection of a National Symbol or Prevention of Disorder?

Unless the changes in Court personnel which have occured since *Street* lead the Court to reverse the majority position taken in that decision,[22] the primary question which *Radich* will present on appeal is whether, although the state may not punish words defiant or contemptuous of the flag, it may nevertheless punish "acts" which are viewed by others to symbolize similar ideas.[23] If this threshold inquiry is viewed by the Court

18. *Id.*

19. *Id.* at 595.

20 *Id.* On remand, the New York Court of Appeals reversed the conviction and called for a new trial solely for the action of burning the flag. People v. Street, 5 Cr. L. Rptr. 2285 (N.Y. Ct. App. 1969).

21. 393 U.S. 503 (1969).

22. Justices Harlan, Brennan, Douglas, Marshall and Stewart composed the majority in *Street*. Separate dissenting opinions were written by Chief Justice Warren, who has since retired, Justices Black and White, and Justice Fortas, who has since resigned. Because there was no "speech" involved in Radich's display of the flag art, as there was in *Street*, it seems unlikely that the Court will review its limited decision in *Street*.

23. The most recent federal decisions are divided on the constitutionality of flag desecration statutes. *See* Hodson v. Buckson, 310 F. Supp. 528 (D. Del. 1970) where the defendant flew the United States flag in a left hand position subordinate to the United Nation flag and was convicted under Del. Code Ann. tit. 11, § 532 (1953), which is almost identical in language to the federal flag legislation, 18 U.S.C. § 700 (Supp. 1970). The United States District Court of Delaware

as controlled under the rationale of *O'Brien*, the question for determination becomes whether the specific tests announced in that decision are satisfied by the New York flag desecration law.

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overturned the conviction and held the statute unconstitutionally overbroad. "In the present case, although non-speech elements are present in the conduct regulated, the statute is so broad that it strikes where no interest is served other than the proscription of expression." *Id.* at 534. The court, although recognizing the state's interest in preserving public order, found that the statute was not so limited. *But see* United States v. Ferguson, 302 F. Supp. 1111 (N.D. Cal. 1969), where the defendant while attending a protest rally burned an American flag on the court house steps. Appealing his conviction under the federal flag desecration statute, the defendant argued that his political protest was protected by the first amendment. Perhaps because burning on the court house steps was illegal regardless of the fuel used for the fire, the District Court merely held that the conviction was within the confines of the requirements of *O'Brien*, without explaining the basis for this conclusion. In United States v. Dratz, 6 Cr. L. Rptr. 2336 (Navy Ct. Mil. Rev. 1970), the defendant, a sailor, wrote the word "revolution" on the United States flag and was convicted under 18 U.S.C. § 700 (Supp. 1970). On appeal, the defendant claimed that his action was a patriotic one designed to demonstrate the "continuing nature of the American revolution", and that the statute was unconstitutionally vague and overbroad. The court dismissed the arguments on the basis that the defendant was convicted for his act of defacing the flag and not for his expression. In Hoffman v. United States, 256 A.2d 567 (D.C. Cir. 1969) the defendant was convicted for wearing a shirt made to look like an American flag with political protest buttoms attached. On appeal, the court upheld the conviction under *O'Brien*.

Recent state court decisions are also in a state of confusion. In People v. Keough, 61 Misc.2d 762, 305 N.Y.S.2d 961 (Monroe County Ct. 1969), the defendant published pictures in a student periodical of an otherwise nude female clothed in an American flag. On appeal from a demurrer to the indictment under the New York desecration statute, the court held the indictment sufficient under the decision in *Radich*. In Commonwealth v. Janoff, 439 Pa. 212, 266 A.2d 657 (1968), the defendant during a Fourth of July parade displayed a United States flag with several phrases on it. Convicted under the Pennsylvania statute that punishes anyone who displays a United States flag with any words on it, but "does not apply to any patriotic or political demonstration", his conviction was upheld on appeal by a divided court. The dissenting opinion argued that the defendant was denied equal protection of the laws. Then in Commonwealth v. Sgerbati, 7 Cr. L. Rptr. 2167 (Ct. Comm. Pl. Phil. 1970), the court overturned a conviction of a defendant who wore an American flag to his draft induction on the ground that the defendant did not cast contempt on the flag but had instead kept it clean and tidy, and in dicta cast serious doubt on the constitutionality of the statute. In Long Island Moratorium Comm. v. Cahn, 39 U.S.L.W. 2016 (E.D.N.Y. 1970), the defendants were convicted under the New York desecration statute for using decals fashioned out of a combination "peace" symbol and United States flag design. The court upheld the statute's constitutionality but overturned the conviction on the basis that the flag definition section of the statute was unconstitutionally overbroad. In People v. Cowgill, 274 Adv. Cal. App. 174, 78 Cal. Rptr. 853 (1969), *appeal dismissed*, 396 U.S. 371 (1970), the Supreme Court dismissed an appeal from the lower court's conviction on the basis that the record did not adequately flush the narrow and predicated issue of whether there was any communicative element in the defendant's conduct of wearing a vest fashioned out of a cut-up American flag. In Hinton v. State, 233 Ga. 174, 154 S.E.2d 246 (1967), the defendant was convicted of lowering the flag to half-mast during a civil rights demonstration, at which point others removed the flag, tore it and shook it in the faces of police officers.

A. Incidental Suppression of Artistic Expression

The dominant issue as viewed by the New York Court of Appeals was whether a state's proscription of certain acts directed toward or involving the use of the American flag furthers an important and substantial governmental interest *and* whether that interest is unrelated to the suppression of otherwise free expression. The New York Court of Appeals went to some length to make clear that Radich was convicted for the "act" of displaying the art in question rather than for any expression or protest made through the medium of art.[24] This approach was dictated by the Supreme Court's earlier encounter with the New York flag desecration statute in *Street*, where the Court expressly left undecided whether a state might constitutionally protect the flag from *acts* of desecration and contempt.[25] Although Radich argued throughout his state appeals that the display of art work is a protected "form of expression",[26] the court of appeals summarily rejected his contention as untenable. In light of the fact that Radich displayed the art commercially for sale, the court's characterization of the defendant's acts as symbolic conduct embodying both speech and non-speech elements seems difficult to question. The initial question confronting the court of appeals was whether the state may incidentally suppress the expression through the regulation of the public display. The Supreme Court stated in *O'Brien*:

> . . . We can not accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaged in the conduct intends thereby to express an idea . . . [and] . . . when "speech" and "non-speech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech elements can justify incidental limitations of first amendment freedom.[27]

Under *O'Brien* then, the mere fact that the defendant displayed

24. The Court of Appeals never expressly mentions in its opinion what the defendant's intent was by holding the display. 26 N.Y.2d at ____, 257 N.E.2d at 32, 308 N.Y.2d at 849. Instead, they construed the statute as malum prohibitum and therefore requiring only a general intent to commit the acts which were the basis for the conviction. In this respect, the court merely stated that the proprietor of the art gallery stood in no better position than the artist who originally included the flag in his constructions. *See id.* at ___, 257 N.E.2d at 36, 308 N.Y.S.2d at 849.

25. Street v. New York, 394 U.S. 576, 594 (1969).

26 *See* People v. Radich, 53 Misc.2d 717, 279 N.Y.S.2d 680 (Crim. Ct. N.Y. 1967), *aff'd*, 57 Misc 2d 1082, 294 N.Y.S.2d 285 (Sup. Ct. 1968); United States Flag Foundation, Inc. v. Radich, 53 Misc 2d 597, 279 N.Y.S.2d 233 (1967).

27. United States v. O'Brien, 391 U.S. 367, 376 (1968).

"protest art" does not provide blanket immunity under the first amendment from otherwise valid state regulation. The significance of the medium employed by the defendant (and the artist) may, however, play a role in determining whether the state's interest is sufficiently important to justify incidental suppression of the expression conveyed by that conduct. Thus, were the Supreme Court to decide generally that "art" serves as a potent form of communication for ideas, much as parades have been characterized as the "poor man's printing press", it follows that the governmental interest in regulation must be "essential"[28] as mandated under the fourth *O'Brien* requirement.

B. Molding O'Brien to "Fighting Conduct": Halter Revisted

The court of appeals, testing the flag desecration statute under the requirements of *O'Brien*, considered the critical issue presented by *Radich*—and earlier by *Street*[29]—to be whether regulation of conduct under the flag desecration statute was in furtherance of a substantial governmental interest unrelated to the suppression of first amendment expression. Relying heavily on *Halter*, the court concluded that the legislative purpose underlying the desecration statute was to prevent breaches of the peace by those likely to react unlawfully in retaliation to conduct thought insulting to or contemptuous of the flag.[30] Thus, the court concluded that the statute was reasonably intended to prevent, by discouraging the commission of provocative conduct in public, possible disruptions of public order likely to flow from public insults to the flag. It is unquestionable that the state has a legitimate and substantial interest in preserving public order. The critical issue (recognized indirectly as such by the court of appeals) is whether the proscription of the defendant's conduct is, as required by *O'Brien*, in *furtherance* of that interest. This question can be answered affirmatively only if Radich's display was likely to be considered an insult to the flag by others in the community, *and* if those viewing his conduct in this manner would be likely to escalate the insult into a breach of the peace. Responding to the first point, the court stated that "Whether the defendant thinks so or not, a *reasonable* man would consider the wrapping of a phallic symbol

28. *Id.* at 377. *See* Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 9-12, 23-25, 29-32; SHIKES, THE INDIGNANT EYE: THE ARTIST AS SOCIAL CRITIC xxiii (1969).

29. People v. Street, 20 N.Y.2d 231, 229 N.E.2d 187, 282 N.Y.S.2d 491 (1967), *rev'd*, 394 U.S. 576 (1969).

30. 26 N.Y.2d at __, 257 N.E.2d at 36, 308 N.Y.S.2d at 851.

with the flag an act of dishonor. . . ."[31] The court made no reference to any evidence either in or outside the record to support this conclusion. Considered in light of the recent variety of commercial and non-commercial exploitations of the American flag and its design[32] that conclusion is clearly one which the Supreme Court may be unwilling to blindly accept. Granting for a moment that the court was correct in its assessment of the likely opinion of the art by a reasonable person, the only remaining issue for the court was whether the legislature could have reasonably concluded that these "reasonable" men would be likely to react violently to acts they viewed contemptuous of the flag. *Radich* answered affirmatively, although perhaps unknowingly, by reliance on *Halter*. In *Halter*, the Supreme Court observed that "Insults to the flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot."[33] *Halter* was not, as is apparent from its language, referring to the reactions of reasonable men, but instead was considering the likely reactions of patriotic men. This distinction is not without importance. First, it suggests that a reasonable man for the New York Court of Appeals is the judicial equivalent of a patriotic man, rather than a citizen who would refrain from violence unless legally justified. This construction suggests why the conduct of the defendant was considered by the court, without much effort, to be an act of dishonor in the eyes of the reasonable observer. Instead of being required to make an empirical study of the propensities of the "average" New York citizen, the court instead was free to impute to the hypothetical patriot those qualities subjectively believed appropriate, and perhaps desired, in a patriotic citizen. Obviously, the net effect of this rationale is to build into the statute a judicial means of protecting the American flag from the loss of its status as a national symbol. This rationale further renders irrelevant any assessment of contemporary exploitations of the flag. This is so because the rationale mandates prohibition without exception of conduct directed at an item which, because of its special status, is deemed irrebutably to hold a position of reverence.[34] On the surface at least,

31 *Id* at 123, 257 N.E.2d at 35, 308 N.Y.S.2d at 852.

32. *See* Time, July 6, 1970, at 8-15; Life, March 31, 1967, at 19-20; cases cited at note 22 *supra*.

33. 205 U.S. at 41.

34. While Justice Harlan's comment in *Halter* concerning "insults to the flag" has been used by several courts, including *Radich*, as justification for the public order interest, it was actually stated in *Halter* to conclude a long discussion on the special place of the flag in American life and how deeply some Americans feel about it. The rationale for upholding the Nebraska statute, which forbade the use of the flag or its design in advertising, was that such use would ". . . degrade and

Radich holds that the New York flag desecration statute prohibits conduct likely to provoke breaches of the peace. Underlying that holding is a subtle construction of the statute which permits a judgment by the judge or jury of the provocative quality of the act and of the propensities of those observing it. Although this construction may be viewed as unacceptable by advocates of absolute first amendment protection, it is not without significant constitutional support.

By its construction of the statute, the court of appeals has in effect carved out, under the *O'Brien* rationale, a "fighting conduct" exception to first amendment protection of symbolic conduct. This conceptual approach parallels the limitations placed on freedom of speech by the Supreme Court under the "fighting words" doctrine. One of the landmark "fighting words" decisions, *Chaplinsky v. New Hampshire*,[35] illustrates the similarities. In that case, defendant was convicted under a New Hampshire statute which prohibited any person from addressing ". . . any offensive, derisive or annoying word to any other person who is lawfully in any street . . . nor call him by any offensive or derisive name . . . with intent to deride, offend, or annoy him. . . ." The defendant in the midst of an encounter with a police officer called the officer a "God damned racketeer" and a "damned Fascist". Following conviction for his exclamations, the defendant appealed to the Supreme Court alleging that the statute violated his first amendment rights. As a preliminary matter, the Court made it clear that first amendment protection is not absolute, stating:

> . . . [I]t is well understood that the right of free speech is not absolute under all circumstances. There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting

cheapen the flag in the estimation of the people, as well as to defeat the object of maintaining it as an emblem of national honor." *Id.* at 42. *See also* Street v. New York, 394 U.S. 576, 616-17 (1969) (Fortas, J., dissenting); Hinton v. State, 223 Ga. 174, 154 S.E.2d 246 (1967). Justice Harlan in *Halter* apparently was holding that the flag desecration statute might be construed in such a way as to maintain the flag as a national symbol. *See* Note, *Desecration of National Symbols as Protected Political Expression*, 66 MICH. L. REV. 1040, 1053 (1966). Clearly Radich would be unable to persuasively argue that his conduct was so minor in comparison with other acts of commercial use of the flag as to be immune from prosecution. *See* Wickard v. Filburn, 317 U.S. 111, 127-28 (1942). On the other hand, the non-violent acceptance by the general public of various exploitations of the flag suggests that Radich's conduct was far from being "likely" to provoke retaliation from visitors to the art gallery. This suggests that the flag no longer maintains the reverence that it held when *Halter* was decided.

35. 315 U.S. 568 (1941).

> words"—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[36]

The Court then noted that the New Hampshire legislation was intended to prevent breaches of the peace, an interest thought to be clearly within the domain of state power. Because the legislative purpose was unrelated to the suppression of protected expression, the principal question presented to the Court was whether the criminal statute was narrowly drawn and limited to speech falling within the unprotected categories. The Court held that the statute met that obligation under the first amendment because of the narrow construction glossed onto the statute by the state courts, which had construed "offensive" to include only utterances which "men of common intelligence would understand would be words likely to cause an average addressee to fight."[37] Moreover, the

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36. *Id.* at 571-72.

37. *Id.* at 573. "The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitute a breach of the peace by the speaker-including 'classical fighting words', in current use less 'classical' but equally likely to cause violence, and other disorderly words . . ." *Id.*

38. Radich, both before the Court of Appeals and in his brief to the Supreme Court, has argued that the New York flag desecration statute is unconstitutional on grounds of vagueness and overbreadth. *See* People v. Radich, 26 N.Y.2d 114, 257 N.E.2d 30, 36, 308 N.Y.S.2d 846, 854 (1970); Brief for Appellant at 24-29, Radich v. New York, *appeal docketed,* No. 169, 39 U S L W 3113 (U.S. May 18, 1970). The Court of Appeals dismissed both arguments summarily, stating that the statute was clear enough to apprise any person of ordinary intelligence as to what was permitted and prohibited, citing Hoffman v. United States, 256 A.2d 567 (D.C. Cir. 1969) and People v Cowgill, 78 Cal. Rptr. 853 (App. Dept. Super. Ct. 1969), *appeal dismissed,* 396 U.S. 371 (1970). While numerous other decisions have upheld similar statutes on this basis, *e.g.*, Joyce v. United States, 259 A.2d 363 (D.C. Cir. 1969); Long Island Moratorium Comm. v. Cahn, 39 U S L W. 2016 (E.D.N.Y. 1970); Hinton v. State, 223 Ga. 174, 154 S.E.2d 246 (1967); the precise issue has never been answered by the Supreme Court. A recent decision by the District Court of Delaware, Hodson v. Buckson, 310 F. Supp. 528 (D. Del. 1970), however, struck down the Delaware flag desecration statute as unconstitutionally overbroad. The court stated that "Here the statute is so broad that it strikes where no interest is served other than the proscription of expression." *Id.* at 534. What the court meant was that the statute was fatally overbroad because it permitted the state to promote an interest related to the suppression of expression contrary to the dictates of *O'Brien.* Because the Delaware statute was almost identical to the New York desecration law, *Hodson* is relied on heavily by the appellant Radich in his brief to the Supreme Court. The difficulty with *Hodson,* however, is that its argument was based on the assumption that an incidental suppression of expression, permissable under *O'Brien,* is equivalent to an independent state interest in suppression, impermissable under *O'Brien. O'Brien* did not suggest that such an equation should or could be made under its rationale. In fact, had the Court meant what the Delaware District court has suggested, the statement in *O'Brien* that some incidental suppression

Court held that this narrow and explicit construction of the statute prevented the statute from being unconstitutionally vague.[38]

The "reasonable man" (patriotic, of average intelligence, etc.) approach which the court of appeals in *Radich* used as the touchstone for "fighting conduct" appears to be an imprecise formulation of the rationale approved in *Chaplinsky*. In *Chaplinsky*, a highly subjective assessment was required of the provocative nature of the expressions made and of the probable reactions of those to whom the expressions were addressed. The question was whether the legislature could have reasonably classified as provocative the defendant's expressions. The Court in *Chaplinsky* chose to uphold the trial court's affirmative resolution regarding the defendant's specific statements.

While *Radich* raises an analogy between fighting words and conduct, it fails to defend the application of either concept to the facts presented on appeal. This failure results from the court of appeals' apparent satisfaction that the defendant's conduct need only be provocative to lose its protection as symbolic conduct under the first amendment. A long line of Supreme Court decisions, including *Chaplinsky*, indicates, however, that this premise is erroneous. For example, *Chaplinsky* does not hold that any provocative speech may be punished. Instead, the Court carefully limited the "fighting words" doctrine to speech which, due to its nature and low ideological content, is of slight social value.[39] As explained in *Chaplinsky*, the state's interest in public order outweighs the interest extended by the first amendment to speech which is not essential to the exposition of ideas and of minimal value as a political expression.[40] The defendant's exclamation to the police officer in *Chaplinsky* that he was a "God damned Facist" was considered by the Court to fall within that classification. On the other hand, peaceful desegregation marches and demonstrations in Southern locales, although extremely provocative, have consistently been viewed outside of *Chaplinsky*, apparently because such demonstrations have traditionally

was permissable would be meaningless. In any event, the reliance on a "fighting conduct" concept by the Court of Appeals as a gloss on the New York statute may well avoid the difficulties of vagueness and overbreadth. This is because the Supreme Court decided in *Chaplinsky* that the statute there in question was not constitutionally defective under either of those tests, because of the gloss placed on that statute by the New Hampshire state court that construction was almost identical to the construction read into the New York statute by the Court of Appeals.

39. 315 U.S. at 572; *cf.* Cantwell v. Connecticut, 310 U.S. at 296, 310 (1939).

40. 315 U.S. at 572.

served protesters for persuasive communication of political dissent.[41] The court of appeals in *Radich* made no attempt to decide whether flag art might serve as potentially effective means of ideological expression, or whether art in the form utilized by Radich was of slight social value. There is no indication, moreover, that any evidence was offered at trial by either the prosecution or the defendant on this issue. As a result, if the Supreme Court elects to pursue an application of the *Chaplinsky* rationale under *O'Brien*, it will be forced to do so on the basis of its own predelictions of the effectiveness of art for political expression.[42]

41. *See* Gregory v. City of Chicago, 394 U.S. 111, 114 (1969) (Black, J., concurring); Cox v. Louisiana, 379 U.S. 536 (1965); Terminello v. City of Chicago, 337 U.S. 1, 4 (1948) (". . . [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction . . . , or even stirs people to anger. Speech is often provocative and challenging."); *cf.* Watson v. Memphis, 373 U.S. 526, 535-36 (1963); Cooper v. Aaron, 358 U.S. 1, 16 (1958) (delay sought in desegregation plan by School Board on ground of extreme public hostility); Buchanan v. Warley, 245 U.S. 60, 81 (1917). *But see* Adderley v. Florida, 385 U.S. 39 (1966). *See generally* Monaghan, *First Amendment "Due Process"*, 83 HARV. L. REV. 518 (1970); Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963); Note, *Injuria Non Excusat Injuriam: Unconstitutional Injunctions and the Duty to Obey*, 1970 WASH. U.L.Q. 51.

42. Unlike desegregation marches and demonstrations or exclamations as in *Chaplinsky*, in *Radich*, the defendant displayed the art forms in a quiet upstairs gallery with no evidence of any public arousal or possible violence. Although the court of appeals in *Radich* did not undertake to balance the interests of the state in preserving public order with those of the defendant in unfettered expression, pursuit of *Chaplinsky's* rationale by the Supreme Court would presumably require such a balance. The comparatively private display of the flag art in *Radich* may weigh heavily against the New York court's reliance on *Halter* to demonstrate the danger of potential breaches of the peace.